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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: COLGATE-PALMOLIVE *
SOFTSOAP ANTIBACTERIAL HAND * 12-md-02320-PB
SOAP MARKETING AND SALES * April 27, 2012
PRACTICES LITIGATION * 2:10 p.m.
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TRANSCRIPT OF PRETRIAL STATUS CONFERENCE
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

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1 P R O C E E D I N G S

2 THE CLERK: Court is in session and has for
3 consideration a status conference in In Re:
4 Colgate-Palmolive Softsoap Antibacterial Hand Soap
5 Marketing and Sales Practices Litigation, MDL number
6 12-md-02320-PB.

7 THE COURT: All right. Good afternoon.
8 Before we begin, let me just make one thing clear.
9 Although I am a member of the judicial panel on
10 multi-district litigation, I did not seek this case out.
11 I was not trying to get it assigned to me. I don't need
12 to go into the circumstances of how it ended up here,
13 but I'm certainly willing to take on the assignment, but
14 it isn't something that I actively sought out.

15 All right. So I thought we could cover a
16 number of things here. First, I want to get a sense of
17 the number of lawsuits, whether there are any other
18 anticipated cases out there. I want to talk to you
19 about counsel issues, class certification issues,
20 discovery, motion practice and settlement.

21 Let me begin by asking, do the plaintiffs have
22 someone who they've agreed upon should be the primary
23 speaker for the plaintiffs' interests today?

24 MS. KARL: Yes, your Honor. We have done
25 private organizing among ourselves, and we have a

1 proposed structure for your Honor.

2 THE COURT: All right. Who is going to be
3 speaking today primarily?

4 MS. KARL: I will primarily be speaking for
5 today, your Honor.

6 THE COURT: For the plaintiffs. Okay. Let me
7 just get a sense from you very quickly -- and then I'll
8 probably turn to the defendant because they may have
9 more information about this. My quick take on these
10 actions is that they are, for the most part, statewide
11 class actions using the state's Consumer Protection Act
12 and unjust enrichment and breach of warranty, and some
13 of them have negligent misrepresentation claims in them.

14 There's one action that is -- at least with
15 respect to some claims seeks to have a nationwide class
16 certified. That the cases arise out of the alleged
17 marketing practices of the defendant and particularly
18 claiming that the product has some chemical in it that
19 has antibacterial properties, and the plaintiffs claim
20 that that is not a correct claim and therefore it's
21 deceptive to market the product with those kinds of
22 claims. Is that essentially what we're dealing with?

23 MS. KARL: You've summarized it far more
24 eloquently than I would have, yes.

25 THE COURT: All right. Thank you. I'll come

1 back to you.

2 Let me ask the defendant. Are there any other
3 actions out there, tagalongs, that may end up being
4 brought in here that we know about yet?

5 MR. MORGAN: Not that we're aware of. I'm
6 sure the plaintiffs would have much more information
7 about potential actions.

8 THE COURT: Let me ask you then. Do you have
9 any thought that there may be other cases being brought
10 here?

11 MS. KARL: We believe there may be an
12 additional action from South Carolina.

13 THE COURT: Okay. I guess, obviously, it's in
14 my interests, and I think everybody's interests, that if
15 it's going to get filed that we get it filed and get it
16 up here as quickly as possible so that we don't have
17 problems with people running behind and being concerned
18 about not participating in early decision making and so
19 on and so forth.

20 So then -- I mean, Ms. Karl knows me very
21 well. I'm sure you've checked me out in terms of my
22 reputation. I want to be clear about this. If I feel
23 lawyers are working together well and making progress, I
24 will tend to be very deferential to efforts by lawyers
25 to manage themselves, conduct their cases their own way,

1 in their own way, and will be very deferential to your
2 suggestions as to how we ought to manage this case.

3 If I at any point become concerned that the
4 case isn't being managed effectively, that my time is
5 not being used productively, that we're not making
6 sufficient progress, then I can become very
7 interventionist and very difficult to deal with.

8 So we'll start out hoping that you will all
9 get along well, manage things effectively, and with the
10 idea that I will be substantially deferential to your
11 desires, and we'll see how it goes. I mean, I fully
12 expect that you won't need me to become difficult to
13 deal with, but I assure you I can become very difficult
14 to deal with if I'm not happy with the way things are
15 going. Okay?

16 So having said that, you've apparently talked.
17 Let me hear from the plaintiffs first as to how are you
18 proposing to organize yourselves, and then we can talk
19 with the defendant about how we're going to deal with
20 the litigation.

21 Ms. Karl, or if you have anybody else that you
22 want to have speak, go ahead.

23 MS. KARL: We have a proposed structure of a
24 plaintiffs' executive committee which would be comprised
25 of Mr. Holland, Mr. Levitt, Mr. Arsenault, Mr. Shaffer

1 and Mr. Climaco.

2 As you may well be aware, Judge McAuliffe has
3 a similar case pending in his court and that is the same
4 PEC structure as in the Dial litigation.

5 THE COURT: Okay.

6 MS. KARL: In addition, for the plaintiffs'
7 steering committee we'll have Jordan Chaikin, David
8 Rash, Jim Shah, Matt Butler and Larry King. Messrs.
9 Chaikin, Rash and Shah are also on the plaintiffs'
10 steering committee in the other pending litigation.

11 So that's the structure that we would envision
12 at this point. We have worked with opposing counsel and
13 sent over a draft discovery plan. He's only just
14 received it so --

15 THE COURT: You're not proposing to have one
16 lead counsel?

17 MS. KARL: Oh, with myself as lead counsel.
18 I'm sorry, your Honor.

19 THE COURT: Okay. I was unclear about that.
20 All right. So lead counsel and the committee structure
21 that you're proposing.

22 MS. KARL: Correct.

23 THE COURT: And all plaintiffs are in
24 agreement with respect to that structure. Okay. And
25 again, I'm inclined to defer to these parties' efforts

1 to organize themselves as long as it makes sense.

2 One of the concerns that I have, because I
3 frequently -- when things come to the very end the
4 problems that develop -- one problem is if I'm asked to
5 approve a request for fees as a part of a resolution of
6 the case, I want to ensure at the outset that the
7 plaintiffs manage the case in a way that's efficient and
8 that we're not building up a loadstar or building up
9 hourly rates. In this case most of your state statutes
10 probably have an attorney's fee provision attached to
11 them, don't they?

12 MS. KARL: Yes.

13 THE COURT: So that in the event you're
14 ultimately prevailing, you would be seeking to recover
15 your fees on an hourly rate basis, I assume, as part of
16 the recovery.

17 MR. LEVITT: I'm Adam Levitt, your Honor.
18 It's not necessarily on an hourly basis, per se. The
19 fee shifts in a number of states. They do permit the
20 multiplier, but we can deal with that down the road. So
21 it's not --

22 THE COURT: Help me understand the
23 relationship then, because say, for example, if this
24 were a -- just say a standard New Hampshire Consumer
25 Protection Act claim, one plaintiff bringing claim

1 against the defendant here for a Consumer Protection Act
2 violation and they recovered, they would be able to
3 recover their attorney's fees as a part of their
4 recovery. I assume that most states work that way,
5 don't they?

6 MR. LEVITT: That's correct, yes.

7 THE COURT: So building into the total amount
8 that's available for recovery here would be attorney's
9 fees that were incurred in prosecuting the action,
10 right?

11 MR. LEVITT: That's correct, your Honor, but I
12 thought I understood your Honor to be saying that that
13 would be a straight hourly rate fee.

14 THE COURT: Right.

15 MR. LEVITT: And I don't believe that under
16 the jurisprudence of each of the states in question
17 necessarily that they award a straight hourly without a
18 multiplier perhaps or anything of the sort. I'm just
19 saying that it's not as open and shut of an issue as
20 that. And also, for example, if this case resolves
21 itself in a common fund format, whether we would ask for
22 a percentage of the fund or something like that. So I'm
23 saying there's a number of issues that could be at play
24 at that point.

25 But to answer the first concern that your

1 Honor has, it's in all of our interests to be as
2 efficient as possible in these cases, and that's always
3 our goal.

4 THE COURT: Well, I mean -- and I'm not in any
5 way questioning anyone's integrity or something and I'm
6 not saying you would do that in this case, but because
7 I'm involved in a lot of this kind of litigation and I
8 have had -- I've issued one of the largest attorneys'
9 fee awards in the history of the United States in the
10 Tyco litigation where I awarded \$496 million to the
11 plaintiff class. I had to do a lot of work on
12 understanding fee awards. And in fact if we are going
13 to get into a percentage of the fund kind of award, I
14 might be asked at some point to do a loadstar
15 cross-check. And to the extent the plaintiffs seek to
16 defend an award, having a bigger loadstar makes having
17 the percentage of the fund award -- a higher percentage
18 of the fund award more likely to be approved. There is
19 a -- I'm not saying people would consciously expend
20 funds unnecessarily -- seek time unnecessarily, but
21 there is a potential to be less than completely
22 efficient to maximize the chance that your total
23 recovery at the end on a percentage of the fund basis
24 would be great.

25 Another problem when you have multiple

1 lawyers -- lawyers' committees working is that each firm
2 is going to want to be able to justify their argument
3 for their allocation of the ultimate fee award, and
4 oftentimes that's done off a base of how much work that
5 they put into it and therefore there's an incentive for
6 each firm to try to get as big a piece of the pie as
7 possible and there's a potential for inefficiency
8 because people need to be demonstrated to have had
9 significant roles in producing the results through the
10 expenditure of time. Do you see what I'm saying?

11 MR. LEVITT: We understand the moral hazards,
12 your Honor, yes.

13 THE COURT: And that is something that I
14 think, based on my experience, it's better to address
15 upfront.

16 And finally, I've had the situation where
17 after the case has settled and I thought I was done with
18 the case the plaintiffs come back to me and one law firm
19 is dissatisfied with the way the fee award has been
20 whacked up amongst the lawyers, and we get into
21 collateral litigation over whose time is best spent.
22 That, to me, is a situation that I want to avoid at all
23 costs here.

24 So I think it's important, from my
25 perspective, that the plaintiffs understand. If I'm at

1 some point asked to approve a settlement, and in having
2 to approve that settlement I have to make an
3 investigation into say, for example, if some measure of
4 the settlement is based on a percentage that would be
5 allocated to an attorney fee award, I might have to look
6 into the expenditure of effort by the plaintiffs.

7 If I'm asked to approve a percentage of the
8 fund settlement, I may be asked to undertake a loadstar
9 cross-checking, at which point I have to look at the
10 fees. And I want to tell you that right now -- to
11 essentially warn you that if you don't have in place an
12 adequate plan to ensure that your time is expended as
13 efficiently as possible, I am warning you that I would
14 be very willing and likely to substantially cut any
15 loadstar cross-check by what I consider to be the
16 inefficient use of time.

17 So I commend you for organizing yourselves.
18 I'm sure you will do your best. But I just want to give
19 you the warning upfront that in how you allocate work
20 amongst yourselves I don't expect multiple people from
21 multiple firms to be attending every deposition and
22 every single document having to be reviewed by every
23 single law firm associated with the case, and people
24 aren't going to be able to whack their time up by
25 reviewing work that other people are doing.

1 Certainly when you work on a committee there
2 has to be some oversight, but it doesn't involve simply
3 one person reading everything that -- everybody in the
4 group reading everything that's going to be submitted.

5 So I just wanted to make clear upfront today
6 that you need to be mindful of that from the beginning
7 of the case. To the extent that -- even if you're not
8 going to be seeking attorney's fees on an hourly rate
9 basis, to the extent I'm going to be asked to do a
10 loadstar cross-check, you're going to have to have
11 contemporaneously maintained time records. So you need
12 to be attentive to that in maintaining and collecting
13 them and doing them in a way that will allow for that
14 process to occur in an efficient way at the end.

15 MR. LEVITT: We hear you loud and clear, your
16 Honor, and we understand.

17 THE COURT: Okay. Good. Another issue -- and
18 again, a lot of it is just because of nightmare problems
19 that I have had. If you are asking me to approve a
20 settlement, at some point I am going to ask you to
21 disclose all fee agreements any of you have had with any
22 of your clients. So if you have fee agreements be
23 mindful that they're going to end up being disclosed to
24 me at the end, because if they aren't -- and I'm dealing
25 with this right now in Tyco even though it's been closed

1 for several years. One of the firms in a consortium
2 that served as lead counsel it's alleged had a fee
3 agreement with its client for a rate that was lower than
4 what I actually approved, and some member of the class
5 has gotten a lawyer to come in and try to argue to me
6 that the fee award should be -- they should be required
7 to disgorge, essentially, a percentage of the fee award
8 because it is not in accordance with an agreement that
9 had been previously reached and not disclosed to me at
10 the time of the settlement.

11 So please be mindful of that. That when
12 you're putting together your final package, if you are
13 able to resolve the case and you are seeking fees, that
14 you will be required to disclose any fee agreements that
15 anybody participating in the fee award portion of the
16 case has, to disclose any of those agreements.

17 MR. LEVITT: Sure. Thank you.

18 THE COURT: Let me see if I've got anything
19 else on the counsel issues.

20 So I assume defendant has no position on any
21 issues with respect to counsel?

22 MR. MORGAN: No, your Honor. We don't object
23 to the way they have chosen to order themselves
24 internally with, I guess, two caveats. I mean,
25 consistent with the comments of the Court.

1 Approval of that doesn't mean that when it
2 comes to any fee award that we're not going to object to
3 what we perceive as unnecessarily duplicative work.

4 Second, a more practical concern. During the
5 litigation, which I don't think we need to address now
6 but only if it arises -- because I'm having this happen
7 in other cases -- is, you know, for instance on
8 discovery issues you're negotiating with one group of a
9 committee and get very far down the line on certain
10 issues and then at the end somebody else comes in and
11 plays bad cop and the whole thing gets upset, and so
12 hopefully that won't be an issue.

13 THE COURT: Yeah, I don't think it will. Ms.
14 Karl, in accepting appointment of lead counsel, I don't
15 mean that to be a position without power or
16 responsibility. Lead counsel is lead counsel, and she's
17 going to speak for the group.

18 MR. MORGAN: And I'm certainly not even
19 suggesting she has to deal with every issue and there
20 can't be other avenues. There are a lot of people on
21 this list, and I want to make sure we don't get into
22 situations where people are coming into --

23 THE COURT: No. I mean, there's certainly the
24 ability for lead counsel to apportion responsibilities
25 for specific issues to people, but in the end of the day

1 the way I deal with lead counsel is I think of them as
2 the lawyer for the case, and I think you're entitled to
3 think of them that way, too, and I'm going to hold her
4 responsible for ensuring that things move in an
5 appropriate way.

6 MR. MORGAN: And the issues may never arise,
7 so it's not an issue right now.

8 THE COURT: Okay. Well, I certainly agree
9 with you and I underscore the point. To the extent
10 people seek compensation and they want to demonstrate
11 that their time incurred should be taken into account
12 when measuring the result that they receive, if the
13 structure isn't efficient it's going to be discounted to
14 the extent it's inefficient. So they've been advised
15 upfront about that.

16 Okay. All right. What I'm anticipating is
17 that we will receive a motion for appointment of lead
18 counsel and the committees that you'll draft and submit
19 and I will in all likelihood approve.

20 MS. KARL: Your Honor, would you like us to
21 file a full motion, or would you like us to do a
22 stipulation?

23 THE COURT: It doesn't matter to me whether
24 it's a motion or a stipulation. You've provided your
25 justification orally, but something that sets forth

1 specifically what the structure is so it is memorialized
2 and we'll then have a margin order from me approving it.
3 So it should be sufficient to the extent that I can
4 merely write granted, and it will be clear to everyone
5 what everyone's assigned roles and responsibilities are.
6 Okay?

7 MS. KARL: Excellent. We will. Thank you,
8 your Honor.

9 THE COURT: Okay. Let's talk class
10 certification here. I don't know, Ms. Karl, if you or
11 other members of the group have thought this through
12 yet. How do you intend to proceed structurally here? I
13 mean, clearly the discovery is going to be identical for
14 all of the individual classes, but structurally speaking
15 here we aren't in a position where we can have one
16 consolidated complaint. It seems to me like we have to
17 maintain the structure of individual statewide classes,
18 so we do have to maintain separate class actions, but I
19 haven't thought that through and I'm interested in any
20 of your thoughts about that.

21 MR. LEVITT: I can address that, your Honor.
22 Adam Levitt, once again.

23 Not unlike what we've done in the case
24 involving Dial, we would anticipate putting up a
25 consolidated master complaint with individual statewide

1 classes after a set of master allegations, and then we
2 would have the claims for each of the states right after
3 that as well, but it would all be in a single pleading.

4 THE COURT: Well, I mean that's the way it
5 works when you have -- clearly when you have multiple
6 nationwide classes that's -- to me it seems easy. Like
7 we did in Tyco, we had one consolidated complaint. In
8 Tyco we had it filed in the New Hampshire action so I
9 could keep the case for the whole time. Here we don't
10 have a New Hampshire action, I understand.

11 MR. LEVITT: That's correct.

12 THE COURT: So if these cases do not settle,
13 they ultimately are going to have to be remanded. If
14 they are remanded, they're going to have to be remanded
15 back to the jurisdictions where the actions were filed.
16 The way I'm thinking of it -- and in Tyco we had so many
17 different kinds of actions. We had a consolidated
18 securities fraud complaint, a consolidated ERISA, a
19 consolidated derivative action complaint, and then we
20 also had things that really didn't fit within that. We
21 had three or four other complaints, class actions, that
22 didn't fit into that three-part structure. Ultimately
23 certain things didn't settle, and I remanded those cases
24 back.

25 If you have one consolidated complaint with

1 subclasses, in effect, and you don't settle the case,
2 how do you deal with the issue of remand at that point?

3 MR. LEVITT: One of two ways, your Honor. The
4 first one is we can deal with the issue of the lexicon
5 waivers at the appropriate time. We may simply want
6 everything here, your Honor. That's item one.

7 Item number two. In terms of the
8 structural -- the physical remand, the fact is you would
9 be sending back those state's claims and that state's
10 class and those state's allegations. Obviously, if we
11 sent back the Illinois case they wouldn't be expected to
12 also hear and adjudicate the South Carolina claims. So
13 it would be that portion of the master --

14 THE COURT: That sever those out of the
15 complaint and remand those to those states?

16 MR. LEVITT: Yes.

17 THE COURT: So the structure then you're
18 envisioning is you take -- in the MDL docket you file a
19 consolidated complaint --

20 MR. LEVITT: Yes.

21 THE COURT: -- that would have separate
22 subclasses for each statewide class.

23 MR. LEVITT: Not subclasses, per se, because
24 they're not sub of anything. They're separate statewide
25 classes.

1 THE COURT: All right. But I think of a class
2 action as a complaint. It may be semantical, but you're
3 basically saying -- what are you going to do with your
4 nationwide class claim? Are you going to try to
5 maintain that?

6 MR. LEVITT: If we have a nationwide claim on
7 the amended complaint, yes. At that point then we would
8 have the state subclass issue. But if we don't go with
9 a single nationwide class, at that point all we have are
10 these statewide classes. We'll cross that bridge in the
11 next period when we consider what to do with the
12 consolidated complaint.

13 THE COURT: My initial view -- and again, I
14 haven't studied the matter, but it's somewhat
15 problematic to try to successfully maintain a nationwide
16 class action in these kind of cases and they, I think,
17 are better thought of as an aggregation of statewide
18 classes, and I don't have any objection to the idea of a
19 consolidated complaint in which all of them are
20 asserted; with the idea that unless there's a lexicon
21 waiver, that if the cases don't settle we would then
22 break it back up and remand the pieces to the individual
23 jurisdictions where they were originally brought. Does
24 that make sense to you?

25 MR. LEVITT: Yes, it does, your Honor.

1 THE COURT: Okay. All right. That makes
2 sense to me. Does the defendant have any objection to
3 that as a way of proceeding?

4 MR. MORGAN: No. We don't have a problem with
5 it in general. The way we've handled that in similar
6 cases is that procedure, and then when it came to
7 briefing class cert. is to have a master certification
8 brief and then shorter briefs that address the
9 particularities of the various state law --

10 THE COURT: Whether we proceed -- I mean, an
11 alternative structure would be to maintain separate
12 dockets and complaints, but whether we did that or not
13 we would definitely have an organized singular approach
14 to motion practice because the last thing I want are
15 people filing motions in individual dockets that are
16 largely duplicative of each other.

17 So I think since you're willing to do it and
18 there isn't objection, it makes sense to me. We'll set
19 a schedule for filing of a master consolidated complaint
20 and that will be filed in one docket, but that it's
21 clear to everybody here that unless there's a lexicon
22 waiver, or unless the case is resolved at my level, if
23 remand is required the net result would be an agreement
24 to sever the state actions and remand to the
25 jurisdictions where they were originally filed. Okay?

1 MR. LEVITT: Yes.

2 MR. MORGAN: Yes, and I do think the
3 consolidated complaint is beneficial because right now
4 there are factual nuances and it would be nice to take
5 those off the table.

6 THE COURT: All right. That's fine. I'm all
7 for simplification if we can possibly achieve it.

8 Tell me about your initial position on class
9 certification. Are you going to be thinking that you
10 might mount a kind of significant challenge to class
11 certification, or can we get right down to business
12 here?

13 MR. MORGAN: Oh, I would be fired if I
14 said we're not going to, your Honor. Of course we are.

15 THE COURT: Well, I've got people who are
16 willing to acknowledge what appears to be a reality,
17 that regardless of the merits of this case the chances
18 are very slim that you're going to be able to avoid
19 class certification.

20 MR. MORGAN: Well, I understand your comments,
21 although we've had very good luck in similar consumer
22 cases.

23 THE COURT: What would be the theory of not --
24 I can certainly see not certifying a nationwide class,
25 but what would be the theory of not certifying a

1 statewide class action?

2 MR. MORGAN: Disclosures on the various
3 products. They're in a line of antibacterial products
4 that the plaintiffs are challenging, a statement about
5 99 percent germs appears on the front, some it appears
6 on the back, and some it's very prominent and some it's
7 not. We're going to have consumer surveys that say, I
8 bought this because it's purple. I bought it because
9 it's lavender. Those are going to be the issues. That
10 people weren't purchasing --

11 THE COURT: Is reliance going to be an
12 individual element here that's not subject to any kind
13 of a presumption of proof?

14 MR. MORGAN: Well, a couple things. I mean,
15 states all vary on the extent to which they really
16 require reliance. A lot of them require causation.
17 Their representation is being challenged. It plays some
18 role in the transaction, and that's where it comes into
19 play. For instance, if this representation only came on
20 the back of the label and we have survey evidence saying
21 ultimately only one percent of the people look at the
22 back of the label, then we're going to have -- we're
23 going to say, no, there can't be any presumption of
24 classwide causation.

25 THE COURT: Okay. Well, certainly where I

1 have -- if you've looked at my record, I'm not an always
2 certify/never certify person. There are occasions where
3 I don't certify class actions and there are cases where
4 I do. And certainly to the extent that there are
5 individual questions of causation or reliance that
6 overwhelm the common issues I've declined to certify a
7 class. So if you have an argument here that you need
8 some discovery to pursue, that's fine.

9 MR. MORGAN: Yeah, I think in terms of our
10 discovery it's probably going to just be depositions of
11 the main plaintiffs. We'll do our internal work on
12 survey evidence, et cetera, but I don't think we're
13 going to need lots of discovery.

14 THE COURT: So you're not going to be in a
15 position to respond to a motion for class certification
16 until you've had a chance to do discovery; is that going
17 to be your position?

18 MR. MORGAN: And after deposing the main
19 plaintiffs; yes, your Honor.

20 THE COURT: All right. So we're going to have
21 some discovery issues associated with class
22 certification, and we might have an aggressively
23 litigated motion to oppose the class certification.

24 MR. MORGAN: And I'm confident the plaintiffs
25 will want discovery from us on the class issues as well.

1 THE COURT: Okay. All right. Well, then
2 let's assume that I'm not going to just have an
3 agreement to certify classes here. I'm going to have
4 some potential opposition.

5 I don't like to waste time, spin wheels. If
6 you think you have a legitimate argument on something
7 like reliance or causation that really has a chance of
8 winning, I fully understand. On the other hand, to the
9 extent it seems to me that somebody is doing something
10 just to string things out, it's going to be problematic
11 for me. It's great if you've got a good faith basis to
12 proceed and have a meritorious reason for opposing it.
13 If you don't, please don't make your client pay for you
14 to work, please don't make the plaintiffs work, and
15 don't make me work unnecessarily because I've got a lot
16 of other things to do.

17 MR. MORGAN: Of course, your Honor. And
18 another issue -- and we'll see if this comes out in the
19 amended complaint, but part of their theory is that a
20 price premium is charged for the antibacterial. That's
21 been an issue that's come up in lots of consumer cases.
22 The Second Circuit had one with Snapple. California had
23 one with Kraft. Both of those, whether there was a
24 price premium, the extent to which it was common across
25 different jurisdictions, it was almost the sole basis on

1 which those courts denied certification. So we think
2 there's also going to be significant issues there.

3 THE COURT: All right. So you're going to be
4 needing some discovery from them, maybe depositions of
5 main plaintiffs.

6 MR. MORGAN: Correct.

7 THE COURT: The discovery you need from them
8 is sort of obvious, and I don't foresee discovery being
9 a huge problem that requires intervention of the Court.
10 Are you anticipating issues with respect to discovery?

11 MS. KARL: No, your Honor. We're anticipating
12 cooperation between counsel that we'll exchange
13 documents. We'll make the plaintiffs available for
14 single depositions and move forward on that basis.

15 THE COURT: How are you proposing to handle
16 the document discovery and the maintenance of a database
17 for discovery, things like that? How are you proposing
18 to handle electronic discovery?

19 MR. LEVITT: I could speak to that, your
20 Honor. To the extent that we're getting everything in
21 electronic format, which I'm not sure we are, that's not
22 a conversation we've had yet. But as we've all done in
23 a number of our cases, both in the past and now, a
24 number of us have very sophisticated internal computer
25 systems and document management systems. We assumed we

1 would use one of the off-the-shelf packages, be it the
2 Summation package perhaps, or something like that, and
3 we would manage everything on there. And we would do
4 the review either on-site or a remote review with the
5 off-site licenses we all have. So there's a way to
6 manage it.

7 THE COURT: If everybody is cooperating
8 together from the plaintiff's side, there won't be any
9 issue of certain representatives having access to the
10 discovery and not others.

11 MR. LEVITT: No. They'll be on a single
12 document server. The reviewers will all have the
13 required access and they'll all be able to see the
14 documents, and we'll all move it forward in the uniform
15 way that we think the private ordering sets forth the
16 right manner of doing it in this case.

17 THE COURT: And you have not yet broached the
18 subject with defense counsel over how you're going to
19 handle discovery; is it going to be electronic, to what
20 extent it is going to be paper?

21 LEVITT: What we've done so far, your Honor --
22 as Ms. Karl said, we sent the other side yesterday a
23 proposed scheduling order. They just got it yesterday
24 so they still need time to review it, but we haven't
25 gotten down to the format of document production yet.

1 That would have to come in the form of an ESI order
2 perhaps, or a preservation order, and that's one of the
3 things -- or two of the things that we're going to work
4 out with the other side hopefully, and then we'll have
5 that conversation.

6 Again, as I'm sure you can tell, it's not the
7 first rodeo for any of us in this room and we'll get it
8 worked out.

9 THE COURT: Again, a lot of my comments stem
10 from problems that I've had over the course of my
11 career. Another problem I had in Tyco with -- I had
12 some of the best lawyers in the United States in that
13 case, as far as I'm concerned, and the principal lawyer
14 for Tyco said to me in a conference at about this stage
15 of the Tyco proceedings, don't worry about electronic
16 discovery, Judge. I will throw myself in front of a bus
17 if the Court has to become involved in these discovery
18 disputes. And then three years later after it was --
19 after the plaintiffs' group had spent many millions of
20 dollars trying to manage a document database and there
21 were huge arguments between plaintiff and defendant as
22 to who was responsible for this charge or that charge, I
23 had a conference with counsel and I said, all right,
24 it's time to get out on the street and throw yourself in
25 front of the bus. You made your promise and you didn't

1 fulfill it.

2 I certainly -- I understand that counsel are
3 experienced, sophisticated and will work in good faith,
4 but I don't want to become involved in discovery
5 disputes. If I have to become involved in discovery
6 disputes, things will get unpleasant for you quickly
7 because I don't like to do that. I expect people to
8 work in good faith and be reasonable.

9 With respect to discovery in almost all cases,
10 skilled lawyers can anticipate what a likely ruling from
11 the Court is going to be, and so I expect them to
12 anticipate that and adjust to it rather than to put the
13 Court to the trouble of having to immerse itself in what
14 seems to me to be silly little disputes. And so I don't
15 want to get involved with them unless absolutely
16 necessary.

17 MR. LEVITT: I think Mr. Morgan and I would be
18 in complete agreement that the only people who like that
19 kind of a discovery fight less than the Court would be
20 the lawyers involved.

21 THE COURT: Okay. Good.

22 MR. LEVITT: We'll do our best.

23 THE COURT: Just don't promise to throw
24 yourselves in front of a bus.

25 MR. LEVITT: I didn't do that, your Honor, and

1 I won't do that, your Honor.

2 MR. MORGAN: Clients, on the other hand, seem
3 to embrace these fights.

4 THE COURT: Yeah, I understand. There may be
5 privilege issues, and I understand that sometimes there
6 are very important legal issues imbedded in a discovery
7 dispute that require the Court's involvement. What I
8 don't expect to be involved in is, this is unduly
9 burdensome and oppressive, this is unfair, why aren't
10 you giving me this, because those kind of things
11 reasonable people should be able to resolve without
12 intervention of the Court.

13 So I will leave you to propose, in the first
14 instance, a plan for discovery, and assuming it's agreed
15 and reasonable I'll likely approve it. But I just warn
16 you, I expect you to move and work together
17 cooperatively, and to the extent you don't it's going to
18 become unpleasant for me and therefore for you.

19 MR. MORGAN: I understand, your Honor.

20 THE COURT: Do you have anything that you want
21 to say about discovery?

22 MR. MORGAN: Your Honor, no. As Mr. Levitt
23 mentioned, we've already talked about in principle
24 stipulating to any SI orders, stipulating to a
25 protective order, and so we'll have all of the pieces in

1 place when it comes time for production. As always,
2 there may be quibbles around the edges, but we'll do our
3 best to work those out.

4 THE COURT: Okay. Then let's talk about
5 motion practice. We've talked about the likelihood of
6 litigation over class certification. Is there going to
7 be a challenge -- likely to be a 12(b)(6) challenge to
8 this consolidated amended complaint?

9 MR. MORGAN: Yeah, we'll of course take a look
10 at it. In fact, there are several pending motions to
11 dismiss in the constituent cases. As your Honor may
12 know, there's one pending in the Dial cases and we'll
13 probably be --

14 THE COURT: Well, my proposal is to deny all
15 outstanding motions to dismiss without prejudice, and
16 we'll file a consolidated amended complaint and a single
17 renewed motion at that time.

18 MR. MORGAN: Yeah, and there were various
19 motions -- not only motions to dismiss, but other
20 motions for certification in the constituent cases.

21 THE COURT: All pending motions should be
22 denied without prejudice.

23 MR. MORGAN: And I think we're all on the same
24 page on that.

25 THE COURT: Okay. All right. Let me just --

1 I mean, I think people in your position had some great
2 hope for Iqbal and Twombly, and we're going to have
3 this renewed and reinvigorated 12(b)(6) practice. I
4 don't think it's materialized, frankly, and I -- not to
5 say that there aren't claims that can be selectively
6 knocked out, but a piece of advice I would offer if you
7 want to be effective in front of me is to be selective
8 about your attacks at the 12(b) stage.

9 MR. MORGAN: The arguments we intend to make
10 are not those type of arguments.

11 THE COURT: Okay. You can bury a few good
12 arguments in a very broadly drafted motion that just
13 wastes time and the Court can miss the good arguments
14 amidst all of the bad ones. So what I'm saying to
15 you -- and you know this as an experienced lawyer, that
16 you in effect educate your opponent and give your
17 opponent a chance to amend around -- which I'm likely to
18 grant -- any deficiencies you point out at the 12(b)
19 stage. So I would urge you to be very selective about
20 what kind of approach you take.

21 MR. MORGAN: Understood. I'm not anticipating
22 particularity claims, for instance.

23 THE COURT: All right. So we're likely to
24 get -- so you're probably going to try to do a 12(b)
25 first and then come in with a class certification and

1 then have summary judgment motions.

2 MR. MORGAN: Correct. Unless, for whatever
3 reason, a particular plaintiff's testimony gives us
4 reason to think we have very good grounds for an SJ, we
5 may bring that ahead of certification, but we would
6 certainly discuss scheduling with the plaintiffs.

7 THE COURT: Okay. When we build up a plan
8 here, we ought to build in deadlines for the filing of
9 these kinds of motions. Okay? So we're going to get
10 probably three rounds of motions. We're going to get
11 12(b). We're going to get a class certification. We're
12 going to get summary judgment.

13 It sounds like, Ms. Karl, that you've already
14 anticipated -- or someone had said this -- what I want
15 to do with respect to motions, which is I only want one
16 motion being filed by the -- one motion with one
17 principal brief being filed by the plaintiffs for all
18 arguments that are being raised.

19 So each time if they file a motion we're going
20 to have one memorandum of law filed. That's the
21 principal memorandum of law. To the extent that there
22 are specific issues that you need a supplemental brief
23 for something on, we can talk about that, but I don't
24 want to have any duplication of legal argument presented
25 to me. So one time. One response to each thing that

1 they do. And to the extent you need to do something
2 supplemental or you need an extension of the page
3 deadlines, I understand that you've got multiple class
4 actions here and multiple lawyers who are maybe more
5 interested in seeing their particular nuance of their
6 state law emphasized in a particular way, but it just
7 has to be done in a non-duplicative way. That's what
8 I'm most concerned about.

9 MS. KARL: Your Honor, that's our full intent.
10 You raised the one issue, and that would be that we will
11 most likely always be asking for an increased page
12 limit, because when you're dealing with the state law in
13 various jurisdictions it grows the brief, but we will
14 only be filing one brief.

15 THE COURT: And I'm fine with that as long as
16 your brief doesn't duplicate -- you have the main brief
17 with the main arguments and then you have a special
18 section on Florida law --

19 MS. KARL: Correct.

20 THE COURT: -- that has an unusual feature
21 where you say, in addition to what we say in the main
22 brief Florida has something unusual, and this is the
23 unusual thing about it and this is where you need to pay
24 attention to it. As long as you're doing it that way,
25 you're not going to have any problem.

1 MS. KARL: That's the way we do it, yes.

2 THE COURT: All right. That's fine. Okay.
3 Just a sense, have you any interest in trying to resolve
4 this earlier rather than later? Have you had any
5 settlement discussions? Do you intend to have them? If
6 you don't feel you can comment publicly about it right
7 now, I understand, but is there anything you can tell me
8 about that?

9 MR. MORGAN: We had a mediation in one of the
10 constituent actions last year. I think we got fairly
11 close, but that was before all of the new entrants. So
12 the case had been filed sometime before and the dynamic
13 has changed, and I think it's unlikely that right now is
14 the right juncture. We're always happy to revisit it
15 when it makes sense. And certainly I'm always in
16 contact with our in-house people about this and they
17 usually tell me when it makes sense, but I don't think
18 we're there yet.

19 THE COURT: Well, from your perspective,
20 assume you deal with these people today, announced a
21 settlement, wouldn't you just have another 34 state
22 class actions filed the next day?

23 MR. MORGAN: Well, typically in that scenario
24 the amended complaint would be nationwide and it will
25 wipe the slate clean, but I don't think that's the

1 hang-up right now.

2 THE COURT: All right. What would you like to
3 say on that?

4 MR. HOLLAND: Eric Holland for the plaintiffs,
5 your Honor.

6 I wasn't a party to the early discussions, but
7 we had been made privy to it by counsel. We did speak
8 with them in some detail early on as the MDL process was
9 getting ramped up, and the early discussions were for
10 one state only that counsel was having with one group of
11 lawyers that since folded into our group here.

12 At that time we did express an interest and
13 continue to have an interest in any kind of a process or
14 any kind of dialogue that counsel would like, and we
15 would just reassure the Court that we have expressed
16 that in the past and continue to express that interest
17 at any time that we would be happy to mediate or any
18 other process that makes sense.

19 THE COURT: Okay. Well, obviously we're very
20 early on in this case. I'm sure there are things that
21 you want from them and things that they're going to need
22 to explore in terms of avenues for defense, and so I
23 fully understand that we may need to take sometime
24 before we move on to the next step.

25 All right. Those were the main issues on my

1 agenda. Now, how do we realize this -- get all of these
2 into the form of action items? I already suggested I
3 need a motion for appointment of lead counsel and the
4 proposed committee structure. That can be filed.
5 That's one of the things that we can do. What else?
6 Yes, counsel.

7 MR. MORGAN: Plaintiffs said that they had
8 mentioned -- proposed last night a joint Rule 26(f)
9 report, and there's some back and forth we're going to
10 need to do on that and also modify it in light of your
11 Honor's comments this afternoon.

12 We had talked about trying to propose
13 something to the Court within 14 days.

14 THE COURT: Yeah, I'm fine with that. What I
15 suggest you do is you actually submit a proposed case
16 management order with your submission if it's agreed
17 upon, and then to the extent I need to modify it if I
18 think there are things I can't accept, I will address
19 them, but you should -- so you're going to set up a
20 discovery schedule. You're going to set up a motion
21 filing schedule.

22 I'm flexible with you regarding motion and
23 response and reply dates in these kind of cases. I'm
24 flexible with you with regard to page limits on
25 dispositive motions. So if you could reach agreement on

1 those -- I recognize in these kind of cases you
2 sometimes need to do more than the page limit, and as
3 long as what you're giving me seems credible -- if I
4 find you're wasting my time, I may unilaterally cut down
5 the page limits, but if you're using your space
6 efficiently and not burying me in unnecessary work, I'm
7 inclined to defer to you.

8 So what I would suggest you do is meet and
9 confer. Is 14 days sufficient time to submit a case
10 management plan with a proposed order addressing all
11 these issues of discovery and motion practice?

12 MS. KARL: Your Honor, I think we can address
13 most of them. What our one thought is, is that we would
14 set the deadline for the summary judgment motion at a
15 later date after you've ruled on class certification.

16 THE COURT: I'm okay on leaving it flexible.
17 In a complex case you need to sometimes adapt to what's
18 going on. That's reasonable to me.

19 I think we should set deadlines for the
20 12(b)(6) motion, and I think it's reasonable -- after
21 you've figured out what classwide discovery, you should
22 be able to agree on a date for filing the class
23 certification motion.

24 So you're going to need a deadline for filing
25 a consolidated complaint, a deadline for answering or

1 otherwise responding to the consolidated complaint.
2 You'll file your motion to dismiss at that deadline.
3 You need to work out your timelines for when answers --
4 are you going to agree to a reply. I really don't want
5 to have surreplies. I'll give you -- in an MDL case
6 I'll give people, anybody who wants it, oral argument on
7 any dispositive motions, so if you just make a request
8 for oral argument. That way you won't need to feel like
9 you need to have a surreply in. You can come in for
10 oral argument if you determine that you want it.

11 I'm happy to decide most things on the papers.
12 Unless people request a conference, I'll give you an
13 opportunity to argue. If I need argument, I'll just
14 schedule it on something.

15 But that's fine with me. You can set those
16 three deadlines and set up your own rules with regard to
17 how long to respond. I mean, if you want to take 30
18 days rather than 14 to respond to the motion to dismiss,
19 that's okay with me. 30 days on the class cert., that's
20 okay.

21 I want to see things moving along though.
22 What I want to see is committed progress, not delay. So
23 as long as you have a schedule that seems reasonable to
24 me and you're in agreement over it, I'm likely to
25 approve it.

1 Are there any specific issues that might come
2 up now that you want my advice on about that case
3 management order, or do you feel you've got what you
4 need from me to go about trying to negotiate it and file
5 it? Is there anything?

6 MS. KARL: Your Honor, from the plaintiffs'
7 side, I think we're all set. Yes, gentlemen? Yes.

8 THE COURT: Anything else?

9 MR. MORGAN: I think that's it, your Honor.

10 THE COURT: All right. Those are the main
11 things on my agenda. What is on your -- are there any
12 other things on your agenda that we haven't yet worked
13 out?

14 MS. KARL: No, your Honor. I think the hard
15 work on our side is just getting in place an ESI and
16 protective orders, and we hope to work collegially with
17 opposing counsel in getting those done in a cooperative
18 way for your Honor's review.

19 THE COURT: Okay. Great. What I'll propose
20 to do then is I'll -- did we agree on 14 days for this
21 case management order? Did we talk about that?

22 MR. MORGAN: Yes.

23 MS. KARL: Yes.

24 THE COURT: So I'll look for that. I'll look
25 for your motion where I can approve you as appointment

1 of lead counsel, and then I'll -- we'll calendar the
2 dates and keep track of things.

3 I probably won't -- unless I see something in
4 the papers you file that's problematic, I probably won't
5 set up another conference with you immediately. To save
6 your time and money, I will try to do status type
7 conferences in the future by telephone so that people
8 don't have to travel, but I reserve the right to bring
9 you in if I feel we're having trouble because I think --
10 that's why -- I know it's expensive for you to come here
11 today, but I did want to see everybody here so that they
12 could hear and see me and I can hear and see them and we
13 can get an understanding amongst ourselves as to how
14 we're going to proceed.

15 Beyond that, I don't expect you will have to
16 show up here every time. If you want oral argument, you
17 can send whatever person you're going to have present
18 the argument. And hopefully you won't need to have a
19 lot of contact with me. If things are going well, you
20 probably won't. If I think things aren't going well or
21 if some of you don't think they're going well, I'm very
22 willing to do weekly or every other week telephone
23 conferences. I'm willing to become more actively
24 involved, but I have confidence in you that you know
25 what you're doing and are experienced. As long as you

1 don't lose that confidence, I'll stay out of your way.

2 Okay?

3 Is there anything else that we need to take up
4 today.

5 MR. MORGAN: Nothing from me, your Honor.

6 MS. KARL: Nothing from the plaintiffs. Thank
7 you.

8 THE COURT: Okay. Thank you for coming.

9 MR. LEVITT: Thank you very much, your Honor.

10 (Conclusion of hearing at 3:00 p.m.)

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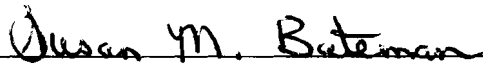
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C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

Submitted: 5-2-12


SUSAN M. BATEMAN, LCR, RPR, CRR
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